

THE RE PUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CRIMINAL SESSION CASE NO. 64 OF 1997

UGANDA

PROSECUTION

VERSUS

KATABAZI EDWARD

ACCUSED

**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE.**

**JUDGEMENT**

1. The accused, Katabazi Edward, is indicted of the offence of rape contrary to sections 117 and 118 of the Penal Code Act. The particulars of the offence are that Edward Katabazi on or about the 10<sup>th</sup> October 1995, at Buyoga village, in Masaka District, had unlawful carnal knowledge of G.N. without her consent. On arraignment the accused denied the charge and the case proceeded to trial.
2. The prosecution, led by the learned Senior Resident State Attorney, Mr. Simon Khaukha, produced the testimony of six witnesses, three of whom, whose evidence was admitted under section 64 (2) of the Trial on Indictments Decree. PW1 was Richard Ssempijja; a special police constable attached to Misanvu Police Post. He stated that on the 11/10/95 he was on duty at Misanvu Police Post. At about 2.00 p.m. the O/C of the police post instructed him to go and effect the arrest of one Edward Katabazi, a suspect in a rape case. Accompanied by PC Sazi, he proceeded to Buyoga Village where the suspect was stated to be resident. On

arriving at Buyoga village they did not find the suspect but they received information that he had gone to Mitugo village. They proceeded to Mitugo village, where they found Edward Katabazi, who on seeing them started running away. They chased him, arrested him and took him to Misanvu police post as instructed.

3. PW2 was No. 23561 PC Khisa; a police officer attached to Misanvu police post. On the 11/10/95 at about 8.30 p.m. he was at Misanvu police post. One special Constable Ssempijja handed over to him one suspect called Katabazi Edward. He re-arrested the suspect and detained him in Police Custody. He had prior to this entered in the station diary book a report in respect of a rape against G.N..
4. PW3 was Francis Mbona, the local council chairman of Buyoga village. He stated that on the 10/10/1995 he was at his residence when one G.N. came and made a report that one Edward Katabazi of the same area had raped her. He saw her in a distressed condition with scratches and bruises around her mouth and neck. He wrote a letter forwarding her to Misanvu police post. On checking at Misanvu Police post on the progress of the case he found Edward Katabazi already arrested and was being forwarded to Masaka police station.
5. PW4 was G.N., the complainant in this case. She testified that on the 9/10/95 she was attacked at about 3.00 am in the night. She was asleep in her house with a little child. She heard the assailant pushing the door. She got up from her bed and went into the living room. She saw the assailant's hand trying to open the door by removing the stick that held it in place. She asked, " who are you?" and the assailant did not answer. The assailant pushed the door and it fell open. She was then able to see the assailant with the aid of moonlight streaming through the door and a ventilator. The moonlight was quite bright at the time. She

recognised the assailant to be Edward Katabazi, the accused in this case. She knew Edward Katabazi prior to this incident as a resident on the same village.

6. The accused grabbed her hands and twisted them. The witness raised an alarm. He then lifted the witness and threw her on her bed. He clutched her neck with one hand pinning her to the bed, while he unbuttoned his trousers. The witness in the meantime was struggling against him. He proceeded to ravish the witness while holding her neck with both hands almost strangling the witness. After he had ejaculated he left the witness, dressed up and left. The witness walked out of the house into the yard and made an alarm. It was answered by her neighbour, PW6; Teopisita with another person called Rwabuganda. She narrated what had happened to her, informing them that she had been raped by the accused. They advised her to report to the local council officials.
7. She proceeded to the Defence Secretary; one Drake Makumbi and she reported the incident. He advised her to report to the chairman. She proceeded to the Chairman's home. She made a report of what had happened, inter alia, mentioning the injuries she had sustained around her neck and face. The Chairman gave her a letter to take to the Police, reporting the incident. He gave her another letter to take to a health centre for treatment. She went to Buyoga health centre where she was treated and then proceeded to Misanvu police post. She reported to the O/C Misanvu police post and gave in the letter from the chairman. The O/C gave her police officers to go and arrest the accused. They did not find him at his home. The police officers told the witness to report back to them whenever the suspect was located.
8. The following day she received a report that the accused was on another village. She went back to the police post and provided that information. The police acted on that information and that very day arrested the accused and brought him to her home in the evening. She

confirmed that this was the person who had ravished her. He was taken to Misanvu police post. She went to Misanvu police post the following day and she was given medical forms to take to Masaka hospital for examination, which she did. She was examined by PW5, Dr. Ssekitoleko. The doctor then filled in the forms she had brought to him and gave them back to her. She returned them to the police. She suffered a number of injuries around her face and neck. She had no grudge with the accused.

9. PW5 was Dr. Jimmy Ssekitoleko; a medical officer attached to Masaka hospital. He testified that he had examined PW4, following a police request. He recorded his findings on the Police form and the attached questionnaire. PW4 had multiple bruises on the face, chest, both arms and both legs. She had multiple soft tissue injuries most likely caused by a blunt instrument. The injuries were in the process of healing. The injuries were consistent with the witness having put up some kind of struggle or resistance. He had not examined her genitalia.
10. PW6 was Teopisita Nakabuye, a cultivator of Buyoga village. She stated that on the 10/10/95 she was asleep at home. She had an alarm at about 3.00 am but she drifted back to sleep. She subsequently had another alarm being raised after some time. She got out of her house and went to a neighbour's home, Rwabuganda Samson. He woke up and together they went to answer the alarm. They found PW4, N., in her courtyard. She was making an alarm but with difficulty. They asked PW4 what had happened and she narrated her story to them. This was to the effect that Edward Katabazi had had broken into her house, attacked her and then proceeded to rape her. They advised N. to go and report to the local council officials. And that was the close of the case for the prosecution.
11. The accused, who was represented by learned Counsel, Mr. Nyanzi, testified on oath in his defence and called no witnesses. He stated that he knew PW4 very well for they lived on the

same village. At the same time PW4 was selling liquor at her home and he used to drink from there quite often. On the night in question in the company of some friends they went somewhere to drink and later returned to their homes. He went to sleep. The following day he got up and went to Kiryasaga village where his uncle had given him some land to cultivate. He was arrested from Kiryasaga village and not Mitugo village as alleged by the prosecution where they found him picking his uncle's coffee. He denied that he ran away when he saw the police officers that had come to arrest him. He stated that prior to his arrest he had not seen PW4 for about two weeks. He had no grudge with PW4. And that was the close of the case for the defence.

12. The learned Senior Resident State Attorney, Mr. Simon Khaukha submitted that the bedrock of the prosecution case was the testimony of PW4, the victim, in this case. It was to be treated as evidence of a single identifying witness who had made a positive identification of the accused in this case aided by three factors. There was bright moonlight. The witness previously knew the assailant. And the assailant came very close to the witness. He referred this court to the case of *Abdala Nabulere v Uganda* 1979 [H.C.B.] 77 in support of his case. He further submitted that the strange conduct of the accused by moving from his village and running away at the time of arrest would provide sufficient corroboration of his guilt in this case. In support thereof he referred this court to the case of *Kayibanda v Uganda* 1976 [H.C.B.] 253. He invited court to find that the case against the accused had been proved beyond reasonable doubt.

13. Learned Counsel for the accused, Mr. Nyanzi, submitted that the conditions favouring a correct identification were absent in this case. The witness came from deep sleep. It was dark in the house. Moonlight streaming in from a ventilator was not sufficient light for

identification in the circumstances. And that light was available for a very short time to enable observation to be made. He referred this court to the case of *Roria v R* 1967 [E. A.] 583 which quoted with approval the case of *Abdalla bin Wendo & Another v R* (1953) 20 [EACA] 163. He submitted that PW4 might have been an honest witness but a mistaken one on the question of identification. As conditions favouring a correct identification were difficult there was need for corroboration, which was, absent in this case. Secondly, this being a sexual offence there was need to corroborate the testimony of the complainant as to the guilt of the accused. Thirdly, he submitted that the accused had set up an alibi, which had not been shaken. He prayed that the accused be acquitted of the charge he was facing.

14. The offence of rape has two elements. Firstly, there must be sexual intercourse between a male, the accused in this case, and a female, the complainant. And secondly, this must be without the consent of the female person. It is the duty of the prosecution to prove these two elements beyond reasonable doubt. See *Woolmington v. D. P. P.* [1935] A.C. 462; *Bhatt v R* [1957] EA 332; *Gabriel s/o Maholi v R* [1960] 159; *Wibiro alias Musa v R* [1960] EA 184; and *Uganda v Sebyala & others* [1969] EA 204.
15. The Prosecution's case rests to a major extent on the testimony of PW4, the complainant in this case. PW4 was consistent in her first report of what befell her to PW6, one of the first people, to arrive at the scene in answer to her alarm, with the report she gave to the local council chairman and the police that led to the arrest of the accused. The local council chairman's testimony was admitted by consent. It was admitted that PW4 made a report to PW2 implicating the accused as the person who ravished her.
16. The former Court of Appeal for Uganda in *Clement Namulambo & Anor v Uganda Criminal Appeal No. 1 of 1978* (unreported) discussed the question of first reports. It quoted with

approval the following passage from *Tekerali s/o Korongozi & others v Reg.*, (1952) 19 E.A.C.A. 259 at Page 260, “ Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safe guard against later embellishments or the deliberately made up case. Truth will often out in a first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.” These remarks would apply here with equal force.

17. The consistence of the first reports made by PW4 to different people soon after the incident with her own testimony in court would suggest that PW4 is a truthful witness. Mr. Nyanzi learned Counsel for the accused did not challenge her credibility as such. His attack was concentrated on the possibility of PW4 being mistaken, though truthful, in the identification of the assailant. PW4 testified in a forthright manner. On her testimony I find that it has been proved that on the night in question she was attacked by an assailant who had sexual intercourse with her against her will or without her consent.
18. That leaves us with the question of whether it was the accused that raped the witness. As Mr. Khaukha pointed out here we are dealing with the question of a single identifying witness. The law applicable in such cases was discussed in the case of *Abudalla Nabulere and others v Uganda*, Criminal Appeal No. 9 of 1978 (unreported) in the following words, “ A conviction based solely on visual identification evidence invariably causes a degree of uneasiness because such evidence can give rise to miscarriages of justice. There is always the possibility that a witness though honest may be mistaken. For this reason, the courts have over the years evolved rules of practice to minimise the danger that innocent people may be wrongly convicted. The leading case in East Africa is the decision of the former Court of Appeal in

Abdalla Bin Wendo and Another v R (1953) 20 EACA 166 cited with approval in Roria v R [1967] EA 583. The paragraph which has often been quoted from Wendo (supra) is at page 168. The ratio decidendi discernible from that case is that: (a) The testimony of a single witness regarding identification must be tested with the greatest care. (b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult. (c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to the guilt. (d) Otherwise, subject to well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone."

19. The court continued and later on in the same judgement stated, " The reason for the caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of identification evidence. If the quality is good, the danger of mistaken identity is reduced but the poorer the quality, the greater the danger."
20. Following the above directions, it is clear that the only light available at the time of the incident to assist in the identification of the assailant was moonlight coming in through a ventilator and possibly the door after it was thrown open. The time for observation under the moonlight was most probably very short. PW4 claims she was able to recognise the accused with the aid of the moonlight. In favour of the witness's identification of the accused is the fact that they well known to each other. The accused used to drink at the witness's home.



Counsel for the accused disputed whether there was any moonlight streaming in through the main door when you consider the location of the house, the movement of the moon that night and the time of the incident in question. PW4 asserted that there was enough light. That may probably have been so. It nevertheless leaves me with a certain amount of unease. The events complained of took place in an otherwise unlit house save for the moonlight. Though the witness knew the accused, it was not indicated in her testimony whether the assailant spoke to her so that voice recognition may have aided her identification. I am not sure of the quality of light in the circumstances of this case. I am inclined to look for some other evidence that would point to the guilt of the accused.

21. At the commencement of this trial, the evidence of PW1, the arresting officer, Sempijja was admitted during the preliminary enquiry under section 64 (2) of the Trial on Indictments Decree. It was read over to the accused. He signed the memorandum of agreed matters, as did his counsel, Mr. Nyanzi. The testimony of PW1 was to the effect that when they went to arrest the accused, they did not find him at his home. But on receipt of further information they traced him on another village. When he saw the police officers he attempted to run away. They chased him and caught him. They arrested him.
22. In his defence the accused denied being found at Mitugo village where the admitted evidence of PW1 shows he was arrested from. He claims to have been at another village, Kiryasaga, at his uncle's home. He testified that he had a garden there on a kibanja given to him by his uncle. He denied that he had run away when he saw the police officers coming to arrest him. In addressing me Mr. Nyanzi never touched on this contradiction of the accused's testimony with the admitted evidence of PW1. I take it that in admitting the testimony of PW1, the defence was accepting the truth of that testimony. I believe the testimony of PW1 for that

reason and find that the accused's version of the events surrounding his arrest was false and appears to be an afterthought.

23. The fabrication of the story of his arrest and the testimony of PW1 which is to the effect that the accused attempted to escape arrest on seeing the police officers provide ample evidence pointing to the guilt of the accused. I found these two pieces of evidence sufficient to provide corroboration for the testimony of the single identifying witness. See *Wasaja v Uganda* [1975] E.A. 181 and *Constantino Okwel alias Magendo v Uganda Supreme Court Criminal Appeal No. 12 of 1990* (unreported). These pieces of evidence also fulfil the requirement for corroboration of the complainants evidence in sexual offences. This is required under a long established rule of practice now abandoned in many jurisdictions for being based on reasons that are no longer sound, considering the current body of knowledge on the subject.
24. In agreement with the gentlemen assessors in this case I find that the prosecution has proved its case beyond reasonable. I find the accused guilty of the offence with which he is charged contrary to Section 117 of the Penal Code Act. I convict him of the same accordingly.

Signed, dated and delivered at Masaka this sixteenth day of October 1998.

FMS Egonda-Ntende

JUDGE

16/10/1998